

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DELAWARE DEPARTMENT
OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL, an
Administrative Agency of the State
of Delaware,

Plaintiff,

v.

MOUNTAIRE FARMS OF
DELAWARE, INC., a
Delaware Corporation,

Defendant.

Case No.

CONSENT DECREE

This Consent Decree (“Consent Decree”) is made and entered into as of this ____ day of May, 2018, by and between Mountaire Farms of Delaware, Inc. (“Mountaire”) and Plaintiff, Delaware Department of Natural Resources and Environmental Control “DNREC”) (collectively, the “Parties”), as more fully set forth herein:

I. Recitals.

1. WHEREAS, Mountaire operates a poultry processing facility located on and nearby Route 24 east of Millsboro, Delaware (the “Facility”); and

2. WHEREAS, DNREC issued the following permits to Mountaire related to the operation of its wastewater treatment facility (“WWTF”) at the Facility: (1) Spray Irrigation Permit No. 359191-04 (the “Spray Permit”); and (2)

Agricultural Utilization Permits Nos. AGU 1402-S- 03 and AGU 1403-S-03 (the “Land Application Permits”); and

3. WHEREAS, the Spray Permit allows Mountaire to operate a WWTF at the Facility that spray irrigates reclaimed wastewater onto agricultural farmland divided into thirteen (13) spray zones located north and south of State Route 24, Millsboro, Delaware. The facility is permitted to dispose of a monthly average quantity of 2.6 million gallons per day at a rate not to exceed 2.5 inches per acre averaged over a seven-day period. The facility has been designed for monthly effluent Total Nitrogen concentration of 15.6 mg/L. The total amount of nitrogen that may be applied annually to each spray field acre is 320 pounds. (Spray Permit attached as Exhibit A); and

4. WHEREAS, the Land Application Permits allows Mountaire to operate a land treatment system for the agriculture utilization of sludge generated by the WWTF. The permit is limited to the application of stabilized sludge from the WWTF at agronomic rates specified in the Land Application Permits. (Land Application Permits attached as Exhibit B); and

5. WHEREAS, at the end of August, 2017, Mountaire discovered that the WWTF was in failure due to a buildup of solids throughout the WWTF, as well as a depletion of oxygen in the aerobic portions of the WWTF (the “System Failure”); and

6. WHEREAS, the System Failure caused Mountaire's wastewater to exceed effluent limitations contained in the Spray Permit; and

7. WHEREAS, on September 5, 2017, DNREC's Groundwater Discharge Section ("GWDS") received a notice via cover letter attached to Mountaire's July Discharge Monitoring Report indicating that operations staff discovered that effluent composite samples were being collected at an invalid sampling point that was not representative of the total combined effluent at the Facility; and

8. WHEREAS, on September 7, 2017, the GWDS received verbal notice from the Facility's operational staff regarding the discovery of additional non-compliance items, which caused the WWTF to apply constituents that exceeded permit levels; and

9. WHEREAS, Mountaire undertook timely interim action to reduce the solids from the spray effluent and disinfect the effluent prior to application on the spray fields; and

10. WHEREAS, in November 2017 Mountaire submitted a Corrective Action Work Plan ("CAWP") setting forth interim measures and a proposal for long-term measures designed to lead to permit compliance, which Plan has been reviewed without objection by DNREC; and

11. WHEREAS, the CAWP is updated to show progress being made and items completed, and Mountaire provides bi-weekly reports to DNREC and participates in monthly meeting with the DNREC staff, and such actions having commenced in September 2017 and continuing to date; and

12. WHEREAS, on November 2, 2017, DNREC issued Notice of Violation No. W- 17-GWD-13 (the “NOV”) identifying a total of seventeen (17) categories of permit violations, including thirteen (13) categories of Spray Permit violations, and four (4) categories of Land Application Permit violations. (DNREC’s November 2, 2017 Notice of Violation is attached as Exhibit C); and

13. WHEREAS, on December 22, 2017, DNREC supplemented its NOV with a letter to Mountaire requiring additional corrective actions for violations of the Spray Permit and the Land Application Permit, AGU 1402-S-03. (DNREC’s December 22, 2017 letter attached as Exhibit D); and

14. WHEREAS, as a result of the failure of the WWTF, Mountaire will be unable to maintain full compliance with the Land Application Permits and the Spray Permit until such time that the long-term improvements to the WWTF are completed; and

15. WHEREAS, Mountaire has already implemented, and is in the process of further implementing interim measures designed to improve functionality of the

WWTF, and Mountaire has committed to fully implementing those interim measures as set forth herein; and

16. WHEREAS, the interim measures implemented by Mountaire after the occurrence of the System Failure have resulted in improvements in the quality of the effluent from the WWTF, but such efforts have not and cannot consistently achieve full compliance with the Spray Permit until the long-term Wastewater Treatment Facility System Upgrade is completed.

17. WHEREAS, Mountaire has retained a design engineer to design long-term system upgrades intended to ensure that the WWTF will be able to meet Spray Permit effluent limitations well into the future; and

18. WHEREAS, Mountaire's design engineer has prepared a preliminary Final Design Summary (the "Final Design Summary") of the proposed long-term WWTF system improvements, and has submitted this Final Design Summary to DNREC to demonstrate contemplation of a long-term corrective action strategy for the Facility; and

19. WHEREAS, it is in the best interests of the parties and maximum benefit to the environment that the remaining interim measures and long-term measures be implemented as soon as possible in accordance with the requirements hereof; and

20. WHEREAS, some but not all of the residential drinking water wells

located some distance from the Facility have tested positive for nitrate as nitrogen above the maximum safe drinking water standard of 10 mg/L; and

21. WHEREAS, Mountaire does not agree or concede that elevated levels of nitrates in the drinking water wells are related to the System failure, the WWTF or Mountaire's past and present operations; and

22. WHEREAS, while Mountaire maintains that it has not caused the nearby drinking wells to have elevated levels of nitrates, many recognize that there have historically been high levels of nitrates in the soils and groundwater in the area prior to the time that Mountaire commenced operations at the Facility. However, as a part of this settlement, Mountaire is committed, as an environmentally beneficial offset, to provide availability of a central water supply system, or in the alternative deep water supply wells, to the residents in the area as shown on the attached Exhibit F (Residential Area); and

23. WHEREAS, contemporaneously with the filing of this Consent Decree, and pursuant to its authority under 7 *Del. C.* § 6005, 7 *Del. C.* §6010(g)(2) and 7 *Del. C.* § 6025, DNREC has brought lawsuits against Mountaire in respect of: (i) violations of its Spray Permit and the Land Application Permits; (ii) handling, treatment, storage, transportation and disposal of solid waste that presents an imminent and substantial endangerment to health and the environment, (iii) handling, treatment, storage, transportation and disposal of solid waste that

constitutes open dumping of solid waste, and (iv) discharge of pollutants into waters of the State and United States through surface water and hydrogeologic connection of Mountaire-contaminated groundwater with Swan Creek, Indian River and Indian River Bay; and

24. WHEREAS, to mitigate for the environmental impact caused by Mountaire's system failure, permit violations and any disposal of solid waste at the Facility, and the contemplated non-compliance with permit conditions until such time that the WWTF upgrades are completed and compliance achieved, Mountaire will determine the quantity of nitrogen applied to the spray fields above permit limits, subject to approval by DNREC, and install a system of wells to withdraw and treat groundwater through the WWTF, commencing when the upgrade to the WWTF is completed and in operation.

25. WHEREAS, Mountaire agrees to undertake the actions set forth herein in addition to the interim and long-term corrective measures at the WWTF in order to resolve and satisfy the allegations set forth in the NOV and to return the WWTF to full compliance with the current or future Spray Permit and Land Application Permits; and

26. WHEREAS, the Parties commit to work cooperatively and communicate regularly to effectuate the purposes of this Consent Decree and allow the Facility to continue operations as long as the requirements of this Consent Decree

are being satisfied, and provided further the parties are committed to pursue timely and efficient performance of the actions identified in this Consent Decree; and

27. WHEREAS, the Parties have agreed that the resolution of any violations of permit conditions or of applicable law addressed by this Consent Decree is in the best interest of the Parties and in the public interest, and that entry of this Consent Decree without further litigation is the most appropriate means of resolving any outstanding matters under the Spray Permit and the Land Application Permits.

NOW THEREFORE, without any admission of fact or law, including without limitation any admission of potential violations of Delaware or federal law or regulations, the Parties hereby stipulate and agree as follows:

II. Objectives.

28. It is the express purpose of the parties in entering into this Consent Decree to undertake actions to protect the public health or welfare or the environment at the Facility and to resolve the claims of DNREC against Mountaire, as provided in this Consent Decree.

III. Jurisdiction.

29. This Court has jurisdiction over the subject matter pursuant to 7 *Del. C.* § 6005, 7 *Del. C.* §6010 (g)(2), 7 *Del. C.* §6025, 10 *Del. C.* § 541, and 10 *Del. C.* § 6501. This Consent Decree shall be governed by, and interpreted under, the laws of the State of Delaware. For purposes of enforcement or implementation of any provision of this Consent Decree, the parties submit to the jurisdiction of this Honorable Court.

IV. Application and Scope.

30. The provisions of this Consent Decree shall apply to and be binding upon DNREC, Mountaire and their respective successors and assigns for the term of this Consent Decree. Execution of this Consent Decree by Mountaire is properly authorized to commit the resources reasonably necessary to satisfy this Consent Decree. Notwithstanding any other provision of this Consent Decree to the contrary, the State of Delaware Department of Justice is not a party to this Consent Decree and no aspect of its legal authority is disturbed by the content herein.

31. In the event Mountaire proposes to sell or transfer the Facility prior to termination of this Consent Decree under Section XX hereto, it shall advise any prospective purchaser or successor-in-interest about the existence of this Consent Decree in writing and provide therewith a copy of the Consent Decree. Mountaire shall also send a copy of such written and provide notification by certified mail,

return receipt requested contemporaneously to DNREC in accordance with Section XVIII of this Consent Decree. In addition, if Mountaire chooses to sell the Facility before this Consent Decree has been terminated, and the prospective purchaser chooses to continue to operate the Facility as a poultry processing facility, then such sale shall be contingent upon the purchaser agreeing to be bound by any remaining obligations applicable to the Facility under this Consent Decree.

32. No transfer of ownership or operation of the Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Mountaire of its obligation to ensure that the terms of this Consent Decree are implemented. At least 30 days prior to such transfer, Mountaire shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the portion of the proposed written agreement addressing this Consent Decree, to DNREC in accordance with Section XVII of this Consent Decree (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Consent Decree.

33. Nothing contained herein shall prevent Mountaire for any reason from discontinuing its poultry processing operations at the Facility and relinquishing its Spray Permit and Land Application Permit, in which case all of Mountaire's requirements to achieve Permit compliance under this Consent Decree shall be

eliminated, provide however, that the remaining requirements of this Consent Decree shall remain in effect. If Mountaire discontinues operations and relinquishes its Spray Permit and Land Application Permits, Mountaire will develop a mitigation plan for Department approval to resolve any outstanding mitigation commitments established via this Consent Decree.

V. Compliance Requirements.

34. **Interim Corrective Measures.** Mountaire agrees to make all reasonable efforts to implement, or to complete, in a timely manner the following interim measures, which are designed to improve functionality to the WWTF in anticipation of the WWTF system upgrades:

Interim Corrective Measures that have been taken prior to the entry of this Consent Decree and have been completed:

- a. Completion of Temporary Storage lagoon
- b. Sludge Removal from Final Pond
- c. Improvements to Activated Sludge System
- d. Pivot Maintenance
- e. Dissolved Air Flotation Unit Installed

Interim Corrective Measures that have been taken prior to the entry of this Consent Decree and are ongoing as of the execution date of this Consent Decree:

- f. Installation of Liquid Oxygen System
- g. Increased WWTF staffing
- h. Installation of Zee Breakpoint Chlorination System

Interim measures that are currently being undertaken but not yet completed are as follows and are scheduled for completion within the time frames indicated:

- i. Offal Room Screening Upgrade..... 18 months from entry of Consent Decree
- j. Removal of Solids from Existing Anaerobic Lagoons until Operational..... 15 months from entry of Consent Decree
- k. Removal of Solids from the Oxidation Ditch..... 3 months from entry of
- l. Removal of Solids stored in Temporary Storage Lagoon..... Time period allowed in Temporary Storage Lagoon Permit

35. **Wastewater Treatment Facility System Upgrade.** Within ten days of the entry of this Consent Decree, Mountaire shall submit to DNREC an application for a construction permit, developed in accordance with Section 6.5.1 of the Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 Del. Admin. C. § 7101, for the

WWTF system upgrade. Such application shall include a schedule to completion within 24 months from the date of submittal. The Parties recognize the importance of timely completion of such system upgrade in order to reduce the amount of total nitrogen that will be applied to Mountaire's spray fields pending the completion and operation of the system upgrade. Accordingly, DNREC agrees to expedite its review of the construction permit application to the maximum extent practicable and permissible under applicable statutes and regulations in order to issue a construction permit in time to allow for completion of the system upgrade according to the schedule of completion set forth in the application. Prior to completion of construction and operational testing of the system upgrade, Mountaire shall submit to DNREC an application for an amendment to the Spray Permit, consistent with applicable regulations, in order to reflect the changes to the WWTF resulting from the system upgrade. From the time the application for amendment to the Spray Permit is filed with DNREC until such amended Spray Permit is issued, Mountaire shall operate the WWTF in accordance with all permit conditions and limitations of the current Spray Permit.

VI. Environmentally Beneficial Offset.

36. **Alternative Water Supply.** The groundwater in the residential area shown as Exhibit F ("Residential Area") has historically, before Mountaire commenced operations at the Facility, contained high levels of nitrates. The

residences in the area, like many others in Sussex County, rely on shallow drinking water wells for a water supply, and on-site septic systems for domestic sewage disposal. Some, but not all residential drinking water wells in the Residential Area, have tested positive for nitrates as nitrogen above the safe drinking water standard. Mountaire shall, as an environmentally beneficial offset, seek to make available to the residential property owners in the Residential Area through Tidewater Utilities (“Tidewater”), a regulated public water supply company, the availability of a central water supply which meets safe drinking water standards. It is recognized by the parties that the Delaware Public Service Commission (PSC) has jurisdiction over the supply of drinking water to the Residential Area and imposes certain requirements before a central water supply system can be installed. DNREC shall cooperate and provide assistance in obtaining PSC approvals necessary to provide the availability of a central water supply system to the Residential Area. In the event that it is not possible to satisfy the PSC requirements for the installation of a central water supply system within the time frame set forth in Exhibit G, then as an alternative Mountaire shall offer to provide deep drinking water wells to the residential property owners in the Residential Area, in accordance with Exhibit G.

VII. Mitigation Measures.

37. **Mitigation.** As a result of the System Failure Mountaire has sprayed and continues to spray effluent onto the spray fields which exceeds the Spray Permit limit for Total Nitrogen. To mitigate for the quantity of Total Nitrogen sprayed above the permit limit, and to abate conditions that may have been caused thereby, Mountaire shall at the time that the upgrade to the WWTF is completed and operational, withdraw groundwater from the spray fields by relocating its shallow plant process production wells to spray field locations containing elevated levels of nitrates, and then after using such withdrawn groundwater for plant processing purposes direct the resulting wastewater to the upgraded WWTF to achieve a reduction of nitrates in the groundwater concentrations. The manner in which the shallow plant processing wells are to be located and the methodology for determining the amount of Total Nitrogen to be reduced from the groundwater treatment is set forth in Exhibit H.

VIII. Monitoring Compliance Certification

38. The Spray Permit as issued on July 31, 2017 and the Land Application Permits as issued on May 30, 2014 each contain monitoring requirements imposed on Mountaire for purposes of determining permit compliance. To assure that the monitoring requirements are being satisfied, that interim corrective actions are being properly performed and continued, and the Facility is being operated in accordance

with this Consent Decree, Mountaire shall, within sixty (60) days of the date of entry of this Consent Decree, submit to DNREC for approval, the names of a qualified licensed professionals or licensed consulting firms with operational sampling and monitoring experience in the spray irrigation of wastewater and agricultural land application of solids to certify that the monitoring requirements contained in the referenced Permits are being satisfied. The Certifications shall be provided to DNREC at the time monitoring results are submitted by Mountaire to DNREC, and such Certifications shall contain a description of any deficiencies and any corrective action taken by Mountaire. If Mountaire is not sooner relieved of this requirement by DNREC, then this requirement shall terminate at the time of termination of the Consent Decree.

IX. Civil Penalties and Costs.

39. Within 60 days after the Effective Date of this Consent Decree, Mountaire shall pay a civil penalty to DNREC in the amount of \$600,000.00, provided however, that the civil penalty shall be reduced by thirty (30) percent as a result of the obligation to provide the Environmentally Beneficial Offset as set forth in Section VI hereof. Payment of the resulting \$420,000.00 shall be made by funds available same day by certified or cashier's check payable to DNREC and delivered by overnight delivery to the attention of Deputy Attorney General Devera B. Scott,

Delaware Department of Justice, 102 W. Water Street, 3rd Floor, Dover, Delaware 19904.

40. In addition to the civil penalty, within 30 days after the Effective Date of this Consent Decree, Mountaire shall pay the costs incurred by DNREC in the investigation of the violations alleged in the Complaint in the amount of \$25,000.00. Payment shall be made by funds available same day by certified or cashier's check payable to DNREC and delivered by overnight delivery to the attention of Deputy Attorney General Devera B. Scott, Delaware Department of Justice, 102 W. Water Street, 3rd Floor, Dover, Delaware 19904.

41. Mountaire shall submit the civil penalty and costs with a transmittal letter, which shall state that the payment is for the civil penalty or costs, respectively, owed pursuant to the Consent Decree in *DNREC v. Mountaire Farms of Delaware, Inc.*, and shall reference the civil action number.

42. The Parties further agree that any violations of the provisions of this Consent Decree may result in the immediate issuance of a cease and desist order pursuant to 7 Del. C. § 6018 to Mountaire and may result in further enforcement action that may include, but is not limited to, additional civil penalties, administrative penalties, criminal penalties, or injunctive relief.

43. DNREC is not required to seek penalties under this Section for any specific violation, and the failure of DNREC to seek a penalty for any specific

violation shall not waive or affect DNREC's rights to seek penalties for any future violation of the Consent Decree.

X. Stipulated Penalties.

44. Mountaire shall be liable for stipulated penalties for violations of this Consent Decree as specified below, unless excused under Section XI (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Consent Decree, including any work plan or schedule approved under this Consent Decree, according to all applicable requirements of this Consent Decree and within the specified time schedules established by or approved under this Consent Decree.

45. Late Payment of Civil Penalties and Costs. If Mountaire fails to pay the civil penalties or costs required under Section IX (Civil Penalties and Costs) of this Consent Decree when due, Mountaire shall pay a stipulated penalty of \$1,000.00 per day for each day that the payment is late after DNREC provides at least five (5) business days advance written notice that the payment is due.

46. Compliance Requirements. Stipulated penalties shall accrue for each violation of the obligation to implement interim or long-term measures by the final date required under Section V of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	Each Day

47. Stipulated penalties under this Section shall begin to accrue on the day after performance is due or on the day that a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

48. Within 20 Business Days of a written demand by Plaintiff, Mountaire shall either pay stipulated penalties or invoke the Dispute Resolution provisions of Section XIV of this Consent Decree.

49. DNREC may in the unreviewable exercise of their discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree

50. Stipulated penalties shall continue to accrue as provided in Section IX, during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of DNREC, which is not appealed to the Court, Mountaire may be required to pay accrued penalties determined to be owing to DNREC within 30 days of the effective date of the agreement or the receipt of DNREC's decision or order if the dispute resolution process is invoked in bad faith.

b. If the dispute is appealed to the Court and DNREC prevails, Mountaire shall pay all accrued penalties determined by the Court to be owing within 60 days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the Court's decision, Mountaire shall pay all accrued penalties determined to be owing, together with interest, within 15 days of receiving the final appellate court decision.

51. Mountaire shall pay stipulated penalties owing to DNREC in the manner set forth and with the confirmation notices required by Section X, respectively, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

52. If Mountaire fails to pay stipulated penalties according to the terms of

this Consent Decree, Mountaire shall be liable for interest on such penalties, as provided for in 7 *Del.C.* § 6005, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit DNREC from seeking any remedy otherwise provided by law for Mountaire's failure to pay any stipulated penalties. Mountaire does not waive and specifically reserves all of its defenses to any such action by DNREC.

53. The stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to DNREC for Mountaire's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of relevant statutory or regulatory requirements, Mountaire shall receive full credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

XI. Force Majeure.

54. A “force majeure” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Mountaire that delays or prevents the performance of any obligation under this Consent Decree despite Mountaire’s best efforts to fulfill the obligation, taking into account DNREC’s commitment to act in a timely manner regarding any matter under consideration or review. A “force majeure” does not include the failure of any of Mountaire’s officers, directors, employees, agents, or contractors to take any actions necessary for Mountaire to comply with the provisions of this Consent Decree, nor does it include the failure of any of Mountaire’s officers, directors, or employees to perform their duties appropriately. The requirement that Mountaire exercise its best efforts to fulfill the obligations, including using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. A force majeure does not include Mountaire’s financial inability to perform any obligation under this Consent Decree.

55. In the event of a force majeure Mountaire shall notify DNREC verbally or in writing as soon as practicable, but in any event within forty-eight hours from the time when Mountaire first knew of the event, or should have known of the event by exercise of due diligence. In this notification or subsequent

communication, Mountaire shall specifically reference this Paragraph of this Consent Decree and describe the anticipated length of time the delay may persist, the cause or causes of the delay, and the measures taken or to be taken by Mountaire to prevent or minimize the delay and the schedule by which those measures will be implemented. Mountaire shall adopt all reasonable measures to avoid or minimize such delays.

56. Failure by Mountaire to comply with the notice requirements of Paragraph 55 as specified above shall render this Section voidable by DNREC.

57. DNREC shall acknowledge receipt of Mountaire's claims of a delay or impediment to performance within five (5) business days of DNREC's receipt of the Force Majeure notice required under Paragraph 55.

58. If DNREC agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the control of Mountaire, and that Mountaire could not have prevented the delay by the exercise of due diligence, then DNREC shall extend the required deadline(s) or all requirement(s) affected by the delay by a period equivalent to the delay caused by such circumstances, or such other period as may be appropriate in light of the circumstances. Such an extension by DNREC shall modify this Consent Decree and does not require Court approval.

59. Unanticipated or increased costs or expense associated with the performance of Mountaire's obligations under this Consent Decree shall not

constitute circumstances beyond Mountaire's control, or serve as a basis for an extension of time under this Section.

60. Notwithstanding any other provision of this Consent Decree, no inference shall be drawn nor presumption adverse to any Party be established as a result of Mountaire's transmitting a notice of Force Majeure.

XII. Release of Liability.

61. Mountaire's satisfaction of its obligations under this Consent Decree shall resolve and release Mountaire of any and all liability of Mountaire to DNREC for its failure in the past and for the period from entry of this Consent Decree until the system upgrade is completed to meet the effluent limitations and other conditions contained in the Spray Permit and to satisfy the compliance requirements in the Land Application Permits, including but not limited to any such liability that might be imposed for violations alleged in the NOV, such liability that might be imposed for alleged contribution to the past or present handling, storage, treatment, transportation or disposal of a solid waste that may present an imminent and substantial endangerment to health or the environment, and such liability that might be imposed as a result of alleged disposal into an "open dump" as defined under 7 *Del. C.* § 6002(35) and 42 U.S.C. § 6403(14), and such liability that might be imposed as a result of discharge of pollutants into waters of the State and United

States through surface water and hydrogeologic connection of Mountaire contaminated groundwater with Swan Creek, Indian River, and Indian River Bay.

62. During the time from the entry of this Consent Decree until Mountaire applies for an amended Spray Permit as required under Paragraph 35 of this Consent Decree, Mountaire shall, during such period, undertake all practical and reasonable measures to operate the WWTF in a manner that achieves results that approach full compliance with the Spray Permit. Mountaire shall further attempt to minimize the impact that the construction of the WWTF system upgrade has on interim operations of the WWTF. Provided Mountaire undertakes the practical and reasonable measures required under this Paragraph 62, Mountaire shall not have any liability for failing to meet the conditions of the Spray Permit prior to the date it submits said application for an amendment to the Spray Permit as required under Paragraph 35.

63. To the extent Mountaire takes required actions identified in this Consent Decree, the release of liability set forth in Paragraph 61 above shall extend through the time this Consent Decree is terminated pursuant to Section XX. This Paragraph is not intended nor shall it be construed to limit the provisions of Paragraph 61 above.

XIII. General Provisions

64. **Court Enforcement.** Upon execution of this Agreement, it shall be entered as an Order of the Superior Court of Delaware (the “Court”). The Court retains jurisdiction over both the subject matter of this Consent Decree for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes.

65. **Modification.** Except for the Court’s exercise of its powers, this agreement may only be modified by written consent of the undersigned parties or their successors. Any changes or amendments to the agreement shall be submitted to the Court for purposes of the entry of a Court Order to reflect the revised agreement. Nothing in this Consent Decree shall be deemed to alter the Court’s power to modify, enforce, supervise, or approve modifications to this Consent Decree.

66. **Admissibility.** This Agreement shall not be deemed an admission of liability or wrongdoing by any Party, and its admissibility shall be limited in accordance with Rule 408 of the Delaware Rules of Evidence in any court proceeding, except in an action to enforce this Consent Decree.

67. **Other Laws.** Except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve Mountaire of its obligation to comply with all applicable federal, state, and local laws and regulations.

XIV. Dispute Resolution.

68. All disputes arising under the terms of the Consent Decree shall be resolved in accordance with the following procedure.

69. Any party wishing to initiate dispute resolution shall provide the other with a written statement outlining the nature of the dispute (the "Notice of Dispute"). The parties, within ten (10) days of the receipt of the Notice of Dispute, shall meet and confer to attempt to resolve their differences informally.

70. If the parties are unable to resolve the dispute within fourteen (14) days of receipt of the Notice of Dispute, or such longer time to which the parties may agree to pursue informal dispute resolution, the dispute shall be submitted to the Court for a hearing.

XV. Information Collection, Retention, and Sharing.

71. **Right of Entry.** DNREC and their representatives, including attorneys, contractors, and consultants, shall have a right of entry upon the premises of the Facility at any time for any lawful purpose, including, but not limited to:

- a. Monitor the progress of activities required under this Consent Decree;
- b. Verify any data or information submitted to DNREC;
- c. Obtain samples and, upon request, splits of any samples taken by Mountaire or its representatives, contractors, or consultants;
- d. Inspect equipment at the Facility;
- e. Inspect and copy all records maintained by Mountaire related in any way to this Consent Decree;
- f. Obtain documentary evidence, including photographs and similar data; and
- g. Assess Mountaire's compliance with this Consent Decree.

72. Nothing in this Consent Decree shall limit the authority of DNREC to conduct tests and inspections under applicable statutory and regulatory provisions.

73. **Information Sharing.** Mountaire and DNREC shall cooperate with the signatories to the Agreement by providing statistics, analysis, audits, and other information regarding compliance with the Agreement. At reasonable times and upon reasonable notice, which need not be more than 30 days, Mountaire shall provide to DNREC copies of documents or things requested by DNREC for the purpose of determining whether Mountaire is complying with this agreement and order. Upon reasonable request and within 30 days, DNREC shall provide to Mountaire documents or things requested upon which DNREC relies in claiming Mountaire is not complying with this Consent Decree. Upon request, Mountaire shall provide DNREC or its authorized representatives with splits of any samples taken by Mountaire. Upon request, DNREC shall provide Mountaire with splits of any samples taken by DNREC or its authorized representatives. Mountaire shall provide DNREC copies of all analytical results, regardless of whether the results are specifically requested by DNREC.

74. **Recordkeeping, Record Retention, and Reporting.** Until three years after the termination of this Consent Decree, Mountaire shall make all reasonable efforts to retain, and shall instruct its contractors and agents to make all reasonable efforts to preserve, all non-identical copies of all final documents (including such documents in electronic form) in its or its contractors' or agents' possession that relate to Mountaire's performance of its obligations under this

Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. The information-retention requirement shall be in addition to any similar information-retention requirement included in any permits, and shall not affect or invalidate any such permit requirements. At any time during this information-retention period, upon request by DNREC, Mountaire shall provide copies of any documents required to be maintained under this Paragraph, subject to Mountaire's right to claim any such documents as privileged under the attorney-client privilege or any other privilege recognized by federal law. If Mountaire asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Mountaire. However, no final documents or records created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

75. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by DNREC pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect

any duty or obligation of Mountaire to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XVI. Effect of Settlement/Reservation of Rights.

76. This Consent Decree resolves the claims of DNREC for the violations alleged in the Complaint filed in this action and included in any Notices of Violation issued to Mountaire by DNREC.

77. DNREC reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, and DNREC does not waive and specifically reserves all defenses to any such claims. Except as provided in Paragraphs 61 and 62 hereof this Consent Decree shall not be construed to limit the rights of DNREC to obtain penalties or injunctive relief under any applicable law, regulation, or permit. DNREC further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or environment that arise at, or posed by, the Facility, whether related to the violations addressed in this Consent Decree or otherwise. DNREC does not waive and specifically reserves all defenses to any such claims.

78. Nothing in this Consent Decree shall affect, impair, or otherwise restrict the legal authority of the State of Delaware Department of Justice with respect to any of its obligations and duties to enforce the criminal and civil laws of the State of Delaware. Nothing in this Agreement shall constitute any form of

release of claims by the Department of Justice. The fact that a Deputy Attorney General has reviewed this Agreement and opined about the appropriateness of its legal form does not render the Department of Justice a signatory or a party to this Agreement.

79. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Unless addressed otherwise herein, Mountaire is responsible for achieving and maintaining compliance with all applicable federal, state, and local laws, regulations, and permits. Unless specifically set forth herein, Mountaire's compliance with this Consent Decree does not guarantee compliance with any applicable federal, state, or local laws or regulations. Mountaire's compliance with this Consent Decree shall be no defense to any action commenced by DNREC pursuant to any such laws, regulations, or permits. Unless specifically set forth herein, nothing in this Consent Decree shall be construed to be a ruling on, or determination of, any issues related to any federal, state, or local permits. Except as expressly set forth herein, it is understood that the interim actions undertaken by Mountaire under this Consent Decree to achieve compliance shall not require individual permits from DNREC and shall be subject to the provisions of Paragraphs 35, 61, 62, and 76 of this Consent Decree.

80. Nothing in this Agreement shall alter DNREC's independent statutory, regulatory, and permitting discretion, and nothing in this Agreement shall

be construed to require DNREC to pay or appropriate any monies or expend any funds.

81. This Consent Decree does not limit or affect the rights of Mountaire or of DNREC against any third parties, not party to this Consent Decree.

82. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree. This Consent Decree affects the rights, obligations, and duties of the Parties only. Notwithstanding any other provision of this Consent Decree to the contrary, nothing in this Consent Decree is intended to, nor shall it be interpreted or construed in a manner which shall: (a) grant any third party the right to enforce any of the terms, rights, or obligations set forth in this Consent Decree; (b) confer any substantive or procedural rights or privileges to any third party in relation to or arising out of any collateral civil or criminal legal proceeding; or (c) waive or otherwise affect the sovereignty of the State of Delaware or the application of 10 *Del. C. § 4001, et seq.* to any civil proceeding involving any officer, employee, or agent of the State of Delaware.

XVII. Costs.

83. Except as DNREC's costs, as provided in Paragraph 40, the Parties shall bear their own costs of this action, including attorney's fees.

XVIII. Notices.

84. Unless otherwise provided herein, notifications to or communications with DNREC or Mountaire shall be deemed submitted on the date they are postmarked and sent either by overnight receipt mail service or by certified or registered mail, return receipt requested, or on the date that they are hand delivered. Except as otherwise provided herein, when written notification or communication is required by this Consent Decree, it shall be addressed as follows:

As to Mountaire:

Michael W. Tirrell
Executive Vice President, Processing Operations
Mountaire Farms of Delaware, Inc.
P.O. Box 1320
29106 John J. Williams Hwy.
Millsboro, DE 19966

with a copy to:

F. Michael Parkowski, Esq.
Michael W. Teichman, Esq.
Elio Battista, Jr., Esq.
Parkowski, Guerke & Swayze, P.A.
1105 N. Market Street, 19th Floor
Wilmington, DE 19801

As to DNREC:

The Honorable Shawn M. Garvin
Secretary
State of Delaware
Department of Natural Resources and Environmental Control
89 Kings Highway
Dover, DE 19904

with a copy to:

Devera Scott, Esq.
Deputy Attorney General
Delaware Department of
Justice
102 West Water Street
Dover, DE 19904

85. Either party may change either the notice recipient or the address for providing notices to it by serving the other party with a notice setting forth such new notice recipient or address.

XIX. Effective Date.

86. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XX. Termination and Satisfaction.

87. This Paragraph establishes the procedures and standards for termination of this Consent Decree.

a. The standard for termination of this Consent Decree is Mountaire's satisfaction of the requirements of this Consent Decree. Specifically, the requirements for termination include payment of any civil penalties and stipulated penalties that may be due to DNREC under this Consent Decree and implementation of the Compliance Requirements under Sections V, VI, VII, and VIII of this Consent Decree.

b. The procedure for termination is as follows: if Mountaire believes that it is in compliance with the requirements of this Consent Decree, and has paid the civil penalties and stipulated penalties required by this Consent Decree, then Mountaire shall so certify to DNREC. Within sixty days after receipt of Mountaire's certification, DNREC shall provide a written response to Mountaire indicating whether DNREC concurs that Mountaire is in compliance with the requirements of this Consent Decree through the date of the certification and has paid the civil penalties required by this Consent Decree. To the extent that DNREC states in such response that it concurs with Mountaire's

certification, then this Consent Decree shall be terminated, effective on the date of Mountaire's certification. To the extent that DNREC states in its response that it does not concur with Mountaire's certification, then DNREC shall identify within its response those requirements of the Consent Decree with which DNREC asserts that Mountaire is not in compliance, and/or any civil penalties that DNREC asserts are due and owing from Mountaire under this Consent Decree. Any disagreement between the Parties with respect to termination under this Paragraph shall be submitted to this Honorable Court for resolution. Termination of this Consent Decree under this Paragraph 86 shall conclusively and finally establish that Mountaire has satisfied all the requirements of this Consent Decree for purposes of Section XVI (Effect of Settlement/Reservation of Rights).

XXI. Miscellaneous Provisions.

88. Each party declares and represents that no promise, inducement, or agreement not herein expressed has been made to it. Each party acknowledges that it and its counsel have received this Consent Decree and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Consent Decree. Each party acknowledges and agrees that this Consent Decree supersedes all

previous settlement negotiations and that this Consent Decree contains the entire agreement between the parties hereto.

89. All submissions shall be considered effective upon receipt, unless otherwise provided in this Consent Decree.

90. This Court retains jurisdiction over both the subject matter of this Consent Decree for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes.

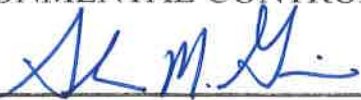
91. The parties consent to the entry of this Consent Decree without further notice.

92. Each undersigned representative of a Party to this Consent Decree certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree, and to execute and legally bind such party to this Consent Decree.

93. This Consent Decree may be signed and dated in any number of counterparts, each of which shall be an original, and such counterparts shall together be one and the same Consent Decree.

Signature Pages Follows

FOR THE DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL

By: 

Date: 5/31/18

Shawn M. Garvin, Secretary
State of Delaware
Department of Natural
Resources and
Environmental Control
89 Kings Highway
Dover, DE 19901

Approved as to

form:

Devera Scott, I.D. No. **4756**
4756 Deputy Attorney
General
State of Delaware Department of
Justice 102 West Water. Street
Dover, DE 19904

FOR MOUNTAIRE FARMS OF DELAWARE, INC.

By: 

Date: 05.31.18

Michael W. Tirrell
VP Human Resources and Business
Services
Mountaire Farms of Delaware, Inc.
P.O. Box 1320
29106 John J. Williams
Hwy. Millsboro, DE 19966

By: F. Michael Parkowski

Date: 5/31/18

F. Michael Parkowski, Esquire, I.D. No. 7
Michael W. Teichman, Esquire, I.D. No. **3323**
3323 Elio Battista, Jr., Esquire, I.D. No. **3814**
3814 Parkowski, Guerke & Swayze, P.A.
1105 N. Market

Street 19th Floor
Wilmington, DE
19801

SO ORDERED, this _____ day of _____,
2018.

Judge